No. 14,516

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES ARENA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Northern District of California.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

James Arena, the appellant, respectfully petitions this Court for a rehearing in the above-entitled cause.

We respectfully petition this Court to re-examine its determination of the legal questions presented on our appeal, and in support of this petition represent to this Court as follows:

We reserve our argued position as to each of the points on appeal, and in this petition address ourselves solely to those features of the decision wherein we believe that we may be of further assistance to the Court, and in which

we believe that this Court may be convinced that its result is based upon the application of incorrect legal principles.

The sequence in which our specification of errors is treated in the opinion of the Court will be followed here.

SPECIFICATION OF ERRORS NOS. 2, 3 AND 4.

Errors numbered 2, 3 and 4 relate to the failure of the Court to grant appellant's motion for judgment of acquittal on the first count of the indictment, the insufficiency of the evidence to sustain the verdict of the jury as a matter of law, and the absence of independent evidence to corroborate the direct witness, Baskin, on the fact alleged as falsely sworn, respectively.

(1) We agree with this Court that "As to the nature of the corroboration, no detailed rule seems to have been laid down, nor ought to be laid down." *Arena v. United States,* Opinion p. 8. Corroboration unquestionably can be found in evidence of any nature whether it be documentary, testimonial or demonstrative. In this regard it is no different from any other fact to be proven. It is noteworthy that Mr. Wigmore, in the same section quoted by the Court in its opinion, says, "The rule (requiring corroboration of the testimony of the principal witness) of course applies only to the proof of the *fact alleged as falsely sworn,* and, therefore, a corroboration as to the *act of swearing* and the words sworn is not called for." Wigmore, 3d Ed. Sec. 2042 (Italics those of Mr. Wigmore). Therefore, it is imperative that we look for the *fact to be proven* to determine whether or not the evi-

dence offered as corroboration has probative value, and that in considering these specifications of errors we be not too concerned with the *nature of the evidence offered* as corroborative.

The fact to be proven by corroborative evidence in this instance is set forth at page 4 of this Court's opinion and in substance is that Mr. Baskin delivered $38,000.00 to appellant at a bank in Oakland (See also Appellant's Opening Brief, p. 34).

Appellant's position as to the failure of the government to produce any evidence bearing upon this fact, the fact to be proven, is set forth in Appellant's Opening Brief, pp. 34-50, and will not be repeated herein.

(2) This Court takes the position that the Supreme Court has related the requirement of corroboration in perjury cases to the principle governing corroboration of confessions (Arena v. United States, Opinion p. 9). We respectfully submit that the case of *Warszower v. United States,* 1941, 312 U.S. 342, 347-48, does not establish a singularity of the rules requiring corroboration of confessions and of the direct witness in perjury cases. The only reasonable relation between the two rules is that *some* corroboration is necessary in both types of cases. The matters requiring corroboration and the purposes to be served by the corroboration in each case is patently different. This is best demonstrated by again referring to the fact which is to be proven by the corroborative evidence in each of the cases.

In confession cases the corroborative evidence must concern the corpus delicti only insofar as it concerns

proof of the injury or loss through the criminality of *someone*. For example, proof of a confession in a murder case must be preceded by other evidence of death by unnatural causes. The corroborative evidence in these cases need not touch the identity of the wrongdoer.

> "(1) * * * for the contrast between the first and the other elements [of the corpus delicti] is what is emphasized by rule, *i.e.* it warns us to be cautious in convicting (upon confession alone), since it may subsequently appear that no one has sustained any loss at all; for example, a man has disappeared, but perhaps he may later reappear alive. To find that he is in truth dead, yet not by criminal violence, *i.e.* to find the second element (somebody's criminality) lacking, is not the discovery against which the rule is designed to warn us.
>
> "(2) * * *
>
> "(3) A third view, indeed, too absurd to argue with, has occasionally been advanced, at least by counsel, namely that the corpus delicti includes the third element also, *i.e.* the *accused's identity* or agency as the criminal. *By this view the term corpus delicti would be synonymous with the whole of the charge, and the rule would require that the whole be evidenced by all three elements independently of the confession, which would be absurd.*" (Italics supplied.)
>
> *Wigmore* 3d Ed. Sec. 2072.

Counsel for appellant have been unable to find any reference, judicial or otherwise, to a requirement in confession cases that any one or all of the elements of the crime charged must be supported by evidence from at least *two independent sources*. Such is not the rule

in confession cases. The nature of the corroboration required in confession cases was succinctly stated in *D'Aquino v. United States,* 172 F. 2d 338, at p. 357 as follows:

> "* * * It is sufficient if the corroborative evidence, when considered in connection with the confession or admission, satisfies the jury beyond a reasonable doubt *that the offense was in fact committed.* * * *" (Italics supplied.)

The italicized portion of the Court's quotation from the opinion in *Opper v. United States,* 1954, 348 U.S. 84, 92, 93 (Arena v. United States, Opinion p. 9), which relates to admissions of the accused, goes no further than to say that there must be evidence other than the admission to establish that a crime had in fact been committed.

A careful analysis of the cases cited in this Court's opinion (Arena v. United States, pp. 9 and 10) reveals that the rule requiring corroboration in confession and admission cases is a requirement that there must be evidence that a crime had in fact been committed before an admission or confession may be considered by the jury. *It is not a requirement that there must be independent evidence of the identity of the perpetrator of the crime.*

In perjury cases the fact to be proven is the falsity of the defendant's oath as charged in the indictment. Falsity is the corpus delicti in perjury cases. *Hammer v. United States,* 271 U.S. 620, 629, 46 S.Ct. 603. In accordance with the standard set forth by the Supreme Court of the United States that fact (the corpus delicti) must be proven by the testimony of two independent witnesses or

one witness and corroborating circumstances. *Weiler v. United States,* 1945, 323 U.S. 606, 65 S. Ct. 548; *United States v. Neff,* 3 Cir., 1954, 212 F. 2d 297, 306. The corroboration must be such that it supplies independent proof of facts inconsistent with the innocence of the accused. *United States v. Hiss,* 2 Cir., 185 F. 2d 822, 824; *United States v. Isaacson,* 2 Cir., 59 F. 2d 966, 968; *United States v. Buckner,* 2 Cir., 118 F. 2d 468, 469; *United States v. Neff,* supra.

It is thus clear that in perjury cases there must be at least two independent sources of evidence which bear upon the fact in issue—the *falsity* of the defendant's statement under oath. This is a substantive rule of law defining the *burden of proof* in perjury cases. The rule as applied in confession and admission cases is a rule governing the *admissibility* of confession and admission in evidence, in the first instance, and does not require that this evidence come from sources independent from that source from which the evidence of an admission or confession is produced. Conceivably and quite probably it has occurred that one single witness has supplied testimony in proof that a crime had in fact been committed and then, upon that foundation (proof of the corpus delicti), this same witness has been permitted to testify as to the fact that he apprehended the accused who at that time made admissions or confessed his guilt to the witness. Surely in this situation it cannot be contended that there is corroboration of the testimony of the single witness, yet the law generally does not require evidence from more than one source upon which a conviction may be had, for example, in the crime of robbery. This is not

true in perjury cases. There must be at least one witness and corroborating circumstances inconsistent with the innocence of the accused to sustain a conviction for perjury.

United States v. Neff, supra.

The error of the Court in relating corroboration in perjury cases to corroboration in confession and admission cases is further pointed up by the opinion in *Pawley v. United States,* 1931, 47 F. 2d 1024, in which Judge Sawtelle participated, which holds that the general rule in prosecutions for perjury has no application where "the appellant expressly admitted upon the trial that the testimony assigned as perjury in the third count was false." This case clearly demonstrates that the term "corroboration" is being used in two entirely distinct and unrelated imports in perjury cases and in confession and admission cases.

The opinion of this Court in the instant case is the first instance to which our attention has been directed in which the Court in effect declares that the corroborating evidence as to the falsity of the defendant's oath need not be independent evidence. This requirement of corroboration by independent evidence the Supreme Court refused to reject in *Weiler v. United States,* supra. Nor has the second circuit, nor the third circuit, nor this circuit heretofore recognized the "cognation" between corroboration in confession cases and in perjury prosecutions to be such as to dispense with the rule that *the corroborating evidence of the falsity of the defendant's oath* must be independent evidence.

While this Court in its opinion makes reference in a footnote, page 11 thereof, to the case of *United States v. Neff,* supra, no effort is made therein to distinguish or in any way reconcile that case with the opinion in the instant case. Appellant is of the firm conviction that the two cases express completely different principles of law and any attorney reading these cases for guidance in a perjury prosecution could not help but become completely confused.

We therefore, respectfully urge that, in order to resolve the conflict between the law applied in this case and the law applied in perjury cases in courts of appeal of this and other circuits and in the Supreme Court of the United States, and to rectify the error committed in affirming the judgment of the trial Court as to specification of errors numbered 2, 3, and 4, this petition for rehearing should be granted.

SPECIFICATION OF ERROR NO. 7.

Appellant very earnestly contends that it is not the intent of Title 28 U.S.C.A., Section 1732(a), which governs the admission of business records, to obviate the necessity for any foundation which would lend truthworthiness to such business records. Such is the effect of this Court's opinion. This is particularly true of Exhibit No. 3, which was admitted by the trial Court merely as an exemplar and not for the probative value of its contents. Mr. Heller was responsible only to himself. Only he had an interest in keeping his records in the manner in which they were kept, whether right or wrong. It is significant that not

one of the witnesses testified that Exhibit No. 3 was the very book which Mr. Heller had kept. There is absolutely no testimony that Mr. Heller made the record in November, 1947. Only Mrs. Heller testified that she "saw most of this record" (R. p. 135). There is not one iota of evidence remotely tending to connect that record with the incidents recorded therein as to the time of occurrence. We respectfully submit that this foundation is insufficient upon which this record could be admitted in evidence as a business record under said Section 1732(a) of Title 28 U.S.C.A., and we repeat for remembrance that it was admitted only as an exemplar. On this latter fact the Court in its opinion did not choose to comment. It seems most obvious to appellant that the trial judge, who observed the witnesses and the exhibits, felt that as to Exhibit No. 3 and, for that matter, exhibits numbered 2, 4, 5, 6, 7 and 8, nothing more had been established than that these exhibits were in the handwriting of Mr. Heller.

We respectfully submit that the identification of handwriting in a document is insufficient foundation upon which a document may be admitted in evidence against a stranger thereto under Section 1732(a) of Title 28 U.S.C.A.

SPECIFICATION OF ERROR NO. 6.

In rejecting appellant's contention that the trial Court erred in permitting Mrs. Heller to testify as to the meaning of initials, figures, dates and symbols contained in exhibits numbered 2, 3, 4, 5, 6, 7 and 8, this Court

declares that persons *familiar* with given *types of documents* may testify as to the meaning of symbols and abbreviations used in such documents. MRS. HELLER'S TESTIMONY REFLECTS AN UTTER LACK OF FAMILIARITY WITH THE CONTENTS OF THESE RECORDS (R. pp. 135, 155-157).

There is a definite distinction in testimony which makes a record of a business transaction admissible when the foundation therefor has been laid and the permitting of a witness to testify thereafter as to the meaning of the contents of the record, where he has *no personal knowledge* of the transaction therein reflected. Neither *Wheeler v. United States,* 211 F. 2d 19, 23, nor *Meyer v. Everett Pulp & Paper Co.,* 193 F. 857, 862, cited by the Court in its opinion goes this far. For our analysis of these two cases see our closing brief, pages 17 and 18. For the correct view, see *Southern Ry. Co. v. Mooresville Cotton Mills,* 4 Cir., 187 F. 72, 73.

We cannot be too strenuous in urging the Court to reconsider appellant's specification of error No. 6 in the light of Mrs. Heller's testimony above referred to, which shows a lack of familiarity with or personal knowledge of the contents of the records and particularly of Exhibit No. 3.

SPECIFICATION OF ERROR NO. 5.

This Court makes the broad statement that "* * * Whitted * * * testified regarding the manner in which Heller's books were kept. * * *" (Arena v. United States, Opinion p. 14.) With this we cannot agree, certainly with

respect to exhibits numbered 2, 3, 4, 5, 6, 7 and 8 and the most that can be gleaned from Whitted's testimony in this regard is that he was personally acquainted with Mr. Heller's method of recording parlay bets (R. pp. 112, 113). There is no evidence whatsoever from which it can be concluded that Whitted had personal knowledge of the contents of any other of Heller's physical records which would qualify him to testify as to the meaning of their contents.

SPECIFICATION OF ERROR NO. 1.

Counsel for appellant apologize to the Court for permitting a clerical error to appear in the reply brief for appellant wherein at page 5 it is stated that count I of the indictment herein sets forth *four* such separate offenses (Italics supplied). Consistent with appellant's contention in his opening brief, at page 30, the statement was intended to read, "* * * that Count I of the indictment herein sets forth five such separate offenses."

Appellant respectfully submits that the cases of *Cornes v. United States,* 9 Cir., 1941, 119 F. 2d. 127, 129, and *Greenbaum v. United States,* 9 Cir., 80 F. 2d. 113, 116 cited in the Court's opinion at page 14 have no application and should be distinguished from an indictment in any perjury case for the reason that the only act of the accused which need be set forth is the precise statement which is alleged to be false, and for the further reason that the offense of perjury is complete each time that a witness under oath swears falsely to any distinct, separate and material matter as to which he is examined. Of

necessity indictments under Section 338 of Title 18 U.S.C.A., as involved in the *Cornes* and *Greenbaum* cases (supra), must set forth a certain minimum of detail as to how the *fraudulent scheme was executed.* Such is not the requirement in indictments for perjury.

SPECIFICATION OF ERRORS NOS. 8, 9, 10, 11 AND 12.

Appellant does not contend that the corroborating evidence must be of a certain kind or type; however, appellant does insist that the corroborating evidence must bear directly and positively upon the alleged falsity of the statement made under oath consistent with the declaration of this Court in *Radomsky v. United States,* 9 Cir., 180 F. 2d. 781, 782, referred to in our Opening Brief at page 67. Likewise, appellant insists that the corroborating evidence must be inconsistent with his innocence—that is, it must bear directly upon the subject matter of the statement which is alleged to be false and it must be inconsistent therewith.

We respectfully submit that the charge of the trial Court on the subject of corroboration (Arena v. United States, Opinion, pp. 16 and 17) inevitably led the jury to their deliberations with the understanding that the direct witness need be corroborated only as to collateral matters to which he testified. This clearly is not the law. This error so prejudiced the appellant as to deny him a fair trial on the principal issue of fact which was submitted to the jury for its determination.

CONCLUSION.

It is respectfully submitted that this petition for rehearing be granted.

Dated, San Francisco, California,
October 26, 1955.

A. J. Zirpoli,
C. Harold Underwood,
Attorneys for Appellant and Petitioner.

Certificate of Counsel

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
October 26, 1955.

A. J. Zirpoli,
Of Counsel for Appellant and Petitioner.